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December 5, 1997

ORIGINAL

Ms. Blanca S. Bayo
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 97-1056-TX

Dear Ms. Bayo:

On behalf of BellSouth BSE, Inc. enclosed for filing in the above referenced docket are the original and fifteen (15) copies of Akerman, Senterfitt & Eidson's Notice of Appearance and Motions to Dismiss Petitions of Florida Competitive Carriers Association, and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. Also enclosed for your records is a diskette containing the above referenced documents formatted in Wordperfect 6.1.

If you have any questions please call me at (850) 222-3471. Thank you.

Sincerely,

Mark Herron
for Mark Herron

ACK _____

AFA 1

APP _____

CAF _____

CML Isler MH/mcd

CTR _____ enclosure(s)

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DOCUMENT NUMBER-DATE

12488 DEC-56

FPSC-RECORDS/REPORTING
TALLAHASSEE ORLANDO

DOCUMENT NUMBER-DATE

12489 DEC-56

FPSC-RECORDS/REPORTING
TAMPA

DOCUMENT NUMBER-DATE

12487 DEC-56

FPSC-RECORDS/REPORTING
TALLAHASSEE

In Re: Application for certificate to
provide alternative local exchange
telecommunications service by
BellSouth BSE, Inc.

Docket No. 971056-TX

Filed: December 5, 1997

**MOTION TO DISMISS PETITION FILED BY
FLORIDA COMPETITIVE CARRIERS ASSOCIATION**

Pursuant to Rule 25-22.037(2) and Rule 28-106.204, Florida Administrative Code, BellSouth BSE, Inc. moves the Florida Public Service Commission (Commission) for an Order dismissing the Petition on Proposed Agency Action filed by the Florida Competitive Carriers Association (FCCA). In support of this Motion, BellSouth BSE, Inc. states as follows:

1. FCCA is a trade association presumably composed of interexchange telecommunications carriers and alternative local exchange telecommunications carriers. FCCA is not a certificated alternative local exchange telecommunications carrier.

2. On November 17, 1997, FCCA filed a Petition on Proposed Agency Action directed to Order No. PSC-97-1347-FOF-TX. That order granted to BellSouth BSE, Inc. alternative local exchange telecommunications service certificate no. 5261 subject to the terms and conditions set forth in that order.

3. Rule 25-22.029(4), Florida Administrative Code, provides that "[o]ne whose substantial interest may or will be affected by the Commission's proposed action may file for a §120.57 hearing, in the form provided by Rule 25-22.036."

4. In its petition, FCCA alleges that, by granting BellSouth BSE, Inc.'s certificate, its substantial interests would be affected as follows:

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Allowing BellSouth to provide local exchange services in the geographical areas in which it serves as the ILEC would affect FCCA's substantial interests by undermining and subverting the legal relationships created by the [Federal Telecommunications Act of 1996], thereby subjecting FCCA's members to anticompetitive and unfair treatment.

FCCA Petition on Proposed Agency Action, p. 3, ¶6.

5. FCCA makes no allegation that it will suffer injury in fact nor is the injury alleged by FCCA of a type or nature which a formal hearing under Chapter 120, Florida Statutes, is designed to protect.

6. In determining whether the FCCA has standing to protest the certificate granted to BellSouth BSE, Inc., the following observation provides useful guidance:

[N]ot everyone having an interest in the outcome of a particular dispute over an agency's interpretation of the law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of the public, is entitled to participate as a party in an administrative proceeding to resolve that dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's efforts to govern, a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling.

Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988).

7. The FCCA's standing, if any, to represent its members interests before the Commission in this licensing proceeding must be predicated upon a finding that its substantial interests will be affected in manner that differs from the interests of the public generally in seeing that all applicants are certified in accordance with statutory requirements. Florida Society of Ophthalmology v. State Board of Optometry, *supra* at 1285.

8. The applicable test for determining whether FCCA's substantial interests are or will be affected was initially stated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 782 (Fla. 2nd DCA 1981), rev. denied 415 So.2d 1359 (Fla. 1982) and 415 So.2d 1361 (Fla. 1982), and has been consistently applied by the courts since that time. The "Agrico test" is as follows:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature the proceeding is designed to protect.

FCCA has failed to satisfy both prongs of the Agrico test.

9. No injury in fact has been alleged by FCCA. FCCA alleges that granting the certificate will subject "FCCA's members to anticompetitive and unfair treatment." FCCA Petition on Proposed Agency Action, p. 3, ¶6. The exclusive remedy for FCCA's alleged injury has been provided by the Legislature in Chapter 364, Fla. Stat. By law, the Commission has "continuing oversight jurisdiction over cross-subsidization, predatory pricing or other similar anti-competitive behavior and may investigate, upon complaint or its own motion, allegations of such practices." See, Section 364.3381(3), Fla.Stat. Inasmuch as BellSouth BSE, Inc. has not commenced operation in Florida, FCCA's allegations about anticompetitive and unfair activities are, at best, premature. If and when anticompetitive or unfair activities manifest themselves, a complaint alleging such activities should be filed with the Commission pursuant to Section 364.3381(3), Fla. Stat.

10. The second prong of the Agrico test is whether the type of injury pled is that which the applicable statute are intended to protect. The main thrust of FCCA's Petition is the allegation that the injury is purely economic and, as a consequence, FCCA is entitled to participate in this

proceeding. See, FCCA Petition on Proposed Agency Action, p.3, ¶6: "An adequate differential between the price BellSouth charges its retail customers and the wholesale price it charges its competitors is the key to viable resale-based competition in the local market;" and p.4, ¶7: "[I]f BellSouth is permitted to sell its services at a discount to "itself" (the subsidiary ALEC), then resell to customers, this mandatory relationship would have circumvented."

11. The general rule in Florida with respect to alleged economic injury has been expressed as follows:

[I]n licensing or permitting proceedings a claim of standing by third parties based solely upon economic interest is not sufficient unless the permitting or licensing statute contemplates consideration of such interests.

Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112, 1118 (Fla. 1st DCA 1983). See also Agrico, *supra* at 482; Florida Medical Center v. Department of Health and Rehabilitative Services, 484 So.2d 1292, 1294 (Fla. 1st DCA 1986) and Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060, 1064 (Fla. 1st DCA 1987).

12. Review of the statute authorizing the certification of alternative local exchange telecommunications companies demonstrates that the injuries alleged by FCCA are not the type of injuries that this type of administrative proceeding was designed to protect.

13. Section 364.337(1) and (2), Fla. Stat., was intended to put competition in the local exchange telecommunications market. The Commission was directed to "grant a certificate of authority to provide alternative local exchange service upon showing that the applicant has sufficient technical, financial and managerial capability to provide such service in the geographic area proposed to be served." Section 364.337(1), Fla. Stat. FCCA has not alleged that BellSouth BSE, Inc.'s application is deficient in any of the above respects.

14. As a consequence, the FCCA has failed to allege any injury of a type or nature that this type of administrative proceeding was designed to protect. As provided in Section 364.377(1), Fla. Stat.:

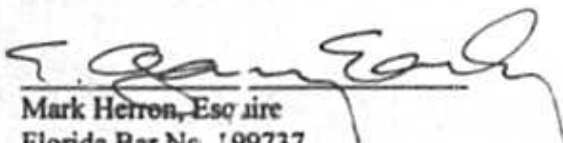
It is the intent of the Legislature that the Commission act expeditiously to grant certificates of authority under this Section and that the grant of certificates not be affected by application of any criteria other than that specifically enumerated in this subsection. (emphasis added).

15. FCCA has stipulated to all the factors that an applicant must possess in order to receive a certificate of authority to provide alternative local exchange telecommunications service under Section 364.337(1) and (2), Fla. Stat. See, Section 120.80(13)(b), Fla. Stat.

THEREFORE, the Petition on Proposed Agency Action filed by FCCA in this docket should be DISMISSED.

Dated this 5th day of December, 1997.

Respectfully Submitted,



Mark Herron, Esquire
Florida Bar No. 199737

E. Gary Early, Esquire
Florida Bar No. 325147

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by United States mail or hand delivery this 5th day of December, 1997:

By Hand Delivery to:

Martha Carter Brown
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Florida Public Service Commission
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E. GARY EARLY